

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LAWRENCE REIN</b>	:	DETERMINATION
	:	DTA NO. 819860
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Personal Income Tax under	:	
Chapter 17, Title 11 of the Administrative Code of the	:	
City of New York for the Year 1998.	:	

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Petitioner, Lawrence Rein, 68-04 Burns Street, Forest Hills, New York 11375, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 17, Title 11 of the Administrative Code of the City of New York for the year 1998.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on October 20, 2004 at 2:45 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Dorothy Moody).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund on the basis that said claim was filed after the applicable statute of limitations for credit or refund had expired.

***FINDINGS OF FACT***

1. On November 29, 2002, the Division of Taxation ("Division") sent a letter to petitioner indicating that a search of its records failed to disclose that petitioner had filed a New York State and City personal income tax return for 1998. On December 5, 2002, petitioner mailed to the Division a photocopy of his 1998 New York State and City resident personal income tax return whereon a refund of \$872.00 was claimed. The entire 1998 return, including signatures, was a photocopy, and while there is no date placed next to petitioner's signature, the accountant who prepared the return inserted the date "2/9/99" next to his signature.

2. By letter dated April 23, 2003, Robert C. Gola, the Division's Deputy Commissioner for Operations, advised petitioner that the \$872.00 refund shown on his 1998 return must be denied. Mr. Gola's letter stated the refund was being denied for the following reasons:

I have asked Glen Mikkelsen of my income tax staff to review your file. Mr. Mikkelsen searched our records, but was unable to locate any previous filing under your name or social security number. Therefore, the return you sent on December 5, 2002, has been accepted as your original filing. However, the Tax Law does not permit us to allow the refund claimed. The deadline for filing for a refund expired three years from the date the return was originally due, or April 15, 2002. Unfortunately, there is no provision in the New York Tax Law for waiving the three year statute of limitations as it applies to requests for refunds. Therefore your refund must be denied.

3. Petitioner's return for 1998 claimed credit for payments totaling \$4,413.00, which amount included New York State tax withheld from wages (\$2,507.00), New York City tax withheld from wages (\$1,381.00), estimated tax payments (\$400.00) and City of New York

school tax credit (\$125.00). Since petitioner's return reported a total New York State and City income tax liability of \$3,541.00, there is an overpayment of \$872.00 which amount petitioner believes should be refunded to him.

4. Since the early 1990s, petitioner has utilized the services of an accounting firm to prepare both his Federal and New York State and City personal income tax returns. Each year the accounting firm would prepare petitioner's returns prior to the due date and give them to petitioner, along with properly addressed envelopes, for his review, signature and mailing. Petitioner would sign the returns and mail both the Federal and New York State and City personal income tax returns at the same time by ordinary first class mail using the mail box in front of his house. This procedure was utilized for preparing and mailing petitioner's Federal and New York State and City personal income tax returns for 1998. A notice from the Internal Revenue Service dated August 14, 2000 advising petitioner that the \$710.00 refund claimed on his 1998 Federal income tax return had been applied to unpaid taxes for 1995 establishes that petitioner's 1998 Federal income tax return was filed within the statute of limitations for refund on some unknown date prior to August 14, 2000.

5. In preparation for this hearing, the Division made a third search of its records in an attempt to locate a 1998 return filed by petitioner prior to December 5, 2002. This search, like the two previous ones, revealed that the Division has only one 1998 return on file for petitioner and that this return was mailed on December 5, 2002.

#### ***SUMMARY OF PETITIONER'S POSITION***

6. Petitioner maintains that he mailed his 1998 New York State and City personal income tax return to the Division on the same date that he mailed his 1998 Federal income tax return. Since the 1998 Federal return was received by the Internal Revenue Service before August 14,

2000, a date clearly within the statute of limitations for credit or refund, petitioner argues that it should also be found that his 1998 New York State and City income tax return was likewise filed before the statute of limitations for credit or refund expired. Petitioner also asserts that his exemplary record of filing timely income tax returns since his discharge from the United States Army Air Force in 1945 should weigh heavily in his favor. Finally, petitioner argues that the Division should have advised him before the statute of limitations for refund expired that it had no record of a 1998 return having been filed under his name or social security number.

### ***CONCLUSIONS OF LAW***

A. As relevant to this proceeding, Tax Law § 687, entitled “Limitations on credit or refund” provides as follows:

(a) General. --- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later . . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return . . . . If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim . . . .

B. For the year at issue, petitioner’s payment of taxes was via tax withheld from wages and estimated tax payments. Pursuant to Tax Law § 687(i), income taxes withheld from wages and estimated tax payments for the 1998 tax year are deemed to have been paid by a taxpayer on April 15<sup>th</sup> of the following year, i.e., April 15, 1999. Accordingly, in order to be entitled to a refund of any of the tax withheld from wages or estimated tax payments, petitioner would be required, pursuant to Tax Law § 687(a), to file a claim for such refund by April 15, 2002. Since it is clear that the 1998 return submitted by petitioner on December 5, 2002 was filed after the

statute of limitations for refund had expired, resolution of the controversy herein turns solely on whether petitioner has proven that he filed a return for 1998 on or before April 15, 2002.

C. Tax Law § 691(a) provides, in pertinent part, that:

If any return . . . required to be filed . . . within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery . . . . If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995, *confirmed Dattilo v. Urbach*, 222 AD2d 28, 645 NYS2d 352; *Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

D. In the instant matter, I am satisfied that the Division has conducted several searches of its records in an effort to locate the 1998 return allegedly mailed on or before April 15, 2002 and that it has no record of ever receiving this return. Since the Division's records reflect that the first time it received petitioner's return for 1998 was on December 5, 2002, the burden is on petitioner to prove (Tax Law § 689[e]), by one means or another, that he filed his return for 1998 with the Division before the statute of limitations for refund had expired. Mr. Rein's testimony concerning the mailing of his 1998 return on or before April 15, 2002, although forthright and sincere, is not sufficient to permit a conclusion that petitioner has met his burden of proving that the return for 1998 was filed (delivered) to the Division before April 15, 2002 (*see, Matter of Dattilo, supra; Matter of Schumacher, supra; Matter of Miller v. United States*, 784 F2d 728,

86-1 US Tax Cas ¶ 9261; *Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]).

E. Petitioner could have avoided any risk of mishandling of the 1998 return by the Postal Service or by the Division had he used certified or registered mail (Tax Law § 691[a]; 20 NYCRR 2399.2[b]), since certification or registration serves as prima facie evidence that a document or payment was delivered. However, petitioner chose to mail his 1998 return using ordinary first class mail and therefore he bore the risk of nondelivery or mishandling. It is noted that when issuing a Notice of Deficiency or Notice of Disallowance to a taxpayer, the Division is required to send the notices by certified or registered mail (Tax Law § 681[a]; § 689[c][3]) to ensure delivery. Accordingly, I see no inequity in the statute since it places the same mailing requirements on a taxpayer to ensure delivery of a document to the Division. Petitioner, once he chose to use ordinary first class mail to mail his return for 1998, should have followed up on the status of the refund claimed on said return within the ample three-year period allowed before the statute of limitations for refund expired.

F. While Tax Law § 687(a) provides for a three-year statute of limitations to claim a refund, it must be noted that the Division, once a return has been filed, generally has a like three-year period to issue a Notice of Deficiency to a taxpayer asserting that additional taxes are due. Therefore, it cannot be found that the statutory scheme is unfair since it provides both parties with the same three-year time frame. Both the Tax Appeals Tribunal, in *Matter of Jones* (January 9, 1997), and the Appellate Division, in *Matter of Brault v. Tax Appeals Tribunal* (265 AD2d 700, 696 NYS2d 579), have upheld the validity of applying the three-year statute of limitations for refund in cases with facts similar to those found in the instant matter. By

establishing time frames for the issuance of notices of deficiency and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed.

G. While it is unfortunate that petitioner cannot be granted the refund he is due because of the expiration of the statute of limitations for credit or refund, such conclusion is within the clear mandate of the statute. Tax Law § 687(e) specifically provides that:

Failure to file claim within prescribed period.--- No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitations specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

H. Finally, petitioner's assertion that the Division should have advised him of its failure to find a 1998 tax return filed under his name or social security number before the statute of limitations for refund expired is without merit. I am not aware of, nor has petitioner pointed to, any provisions in the Tax Law, regulations or precedent which places such a responsibility on the Division.

I. The petition of Lawrence Rein is denied and the Division's Notice of Disallowance dated April 23, 2003 is sustained.

DATED: Troy, New York  
January 6, 2005

/s/ James Hoefer  
PRESIDING OFFICER